May 24, 2010

Ms. Nancy Sutley, Chair
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Re: Comments on the CEQ's Draft Guidance For NEPA Mitigation and Monitoring

Dear Ms. Sutley:

Initiated in 1898, the National Cattlemen's Beef Association (NCBA) is the trade association and marketing organization for America's cattle producers. With offices in Denver and Washington, DC, NCBA is a consumer-focused, producer-directed organization representing the largest segment of the Nation's food and fiber industry. Our members are proud of our tradition as stewards and conservators of America's open spaces, and good neighbors to our communities. We support and conduct wide-ranging measures to protect our environment, which we carry out every day of every year in supplying America and much of the rest of the world with the food they need.

The Public Lands Council (PLC) has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land, accounting for critical wildlife habitat and the nation's natural resources. PLC works to maintain a stable business environment in which over 25,000 federal grazing permittees can conserve the West and feed the nation and world. As representatives of family farmers and ranchers with a vested interest in protecting the environment, NCBA and PLC are pleased to provide the following comments.

NCBA and PLC are concerned that CEQ's draft guidance on greenhouse gas (GHG) mitigation and monitoring is premature given the fact that there are legal appeals of EPA's Endangerment Finding (the foundation for GHG regulation) making their way through the DC Circuit Court of Appeals. NCBA urges the CEQ to consider pausing to learn the outcome of the appeals which will determine whether "Climategate" and other scientific scandals fatally undermine the validity of moving forward with GHG regulations and considerations under NEPA. If the CEQ decides to ignore Climategate concerns and move forward with a final guidance document, NCBA and PLC are concerned about and oppose the fact that the guidance moves CEQ from its traditional mission of protecting the environmental review process, toward a mission of requiring substantive mitigation of impacts identified during NEPA reviews.

I. <u>CEQ should Not Move Forward with the Guidance Until the Outcome of the Endangerment Finding Appeals is Known</u>

NCBA and PLC urge the CEQ to refrain from moving forward with NEPA guidance addressing greenhouse gas emissions until the outcome of the legal appeals of the US Environmental Protection Agency's Endangerment Finding (EF) is known. The EF is the prerequisite and foundation for the guidance and, if overturned, would render it unnecessary or invalid. There is substantial doubt as to whether any anthropogenic sources of GHG cause or significantly contribute to climate change. NCBA, along with other organizations and businesses, submitted extensive comments on EPA's proposed

endangerment finding under section 202(a) of the Clean Air Act challenging the underlying science supporting the endangerment finding, which NCBA and PLC incorporate by reference here. Docket ID Nos. EPA-HQ-OAR-2009-0171-0322, -4041, -5158, -11454, -11455, -11536, and -11686. Those comments establish that there is not currently a sound scientific basis for concluding that anthropogenic releases of GHG have a causative effect on global temperature changes. While EPA has since issued its final EF and has adhered to it faulty conclusions, 74 Fed. Reg. 66496 (Dec. 15, 2009), NCBA, along with other organizations and businesses filed a petition for review in the DC Circuit Court of Appeals, challenging EPA's EF, and every final rule promulgated since then with the intention of implementing the EF. Coalition for Responsible Regulation, et al. v. EPA, No. 09-1322 et al. (D.C. Cir.). NCBA also filed on February 11, 2010, a petition for reconsideration requesting EPA to reassess the data and analysis upon which the EF is based and to remedy the agencies unlawful delegation of its statutory duties to other bodies, including foreign entities. NCBA and PLC incorporate the petition for reconsideration by reference here.

The EF explicitly relies throughout on reporting by the United Nations Intergovernmental Panel on Climate Change (IPCC). 74 F.R. 66511. The public disclosure of serious and far-reaching problems with the underlying science and procedures used by the IPCC began to emerge in November 2009, shortly before EPA rushed to issue its EF in early December (so that it could be announced at the Copenhagen Conference on climate change). Indeed, "climategate," which disclosed apparent climate science manipulation in thousands of e-mails, computer codes and other documents from the Climate Research Unit at the England's University of East Anglia, has shaken society's confidence in climate science to its core. The validity and reliability of the IPCC's conclusions that human emissions of greenhouse gases (GHGs) pose a threat of catastrophic global warming have been duly impeached.

The legal appeals of the EF present important questions regarding the legality, indeed the very constitutionality, of EPA's decision to off-shore its statutory obligations to a foreign agency. They also challenge the adequacy of EPA's actual consideration of comments pointing out the profoundly contradictory and unsettled nature of climate science, and the enormously far-reaching and burdensome impacts which regulation of GHGs will have on every segment of American society and the American economy. Given EPA's overwhelming reliance on, and rubber stamping of, the IPCC's work, it seems only logical and responsible for the EPA and CEQ to refrain from issuing far-reaching rules and guidance that fundamentally rely on that Finding until the outcome of the appeals process is known.

II. <u>Substantive Mitigation of Impacts</u>

The guidance document implores federal agencies to follow up when a "finding of no significant impact" (FONSI) relies on mitigation of environmental impacts following the generally less demanding Environmental Assessment process, and when agencies commit to mitigation in an Environmental Impact Statement (EIS). In particular, it establishes three broad goals for federal agencies during the review process: 1. Establish and enforce binding mitigation commitments identified by the reviewing agency; 2. Establish monitoring plans and programs to ensure mitigation implementation and effectiveness; 3. Make results available to the public. NCBA and PLC submit that the guidance moves CEQ from its traditional procedural mission of protecting the environmental review process, to a mission

of requiring substantive mitigation. The US Supreme Court made clear in *Robertson* that such substantive obligations are beyond the scope and authority of NEPA. *Robertson v. Methow Valley Citizens Council* 490 U.S. 332, 351-352, 109 S.Ct. 183 (1989).

In *Robertson*, the Supreme Court made it clear that requiring a detailed description of specific mitigation measures that would be implemented as part of the proposed federal action was beyond the scope of NEPA. The Court held that "[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." Id. at 353 n.16. Currently, the only law that arguably authorizes the regulation of GHG emissions by an agency is the Clean Air Act. Therefore, it is inappropriate for the CEQ include these measures in its final guidance.

III. Monitoring Implementation and Effectiveness

Current NEPA regulations provide for agency mitigation monitoring to ensure that their decisions are carried out in important cases. But the draft guidance expresses the need for ongoing "implementation" and "effectiveness" monitoring anytime a mitigation commitment is made in the NEPA process, regardless of its importance. Normally, post decision monitoring requirements are required when preparing supplemental impact statement where significant new information may become available after an EIS is prepared, but before the agency makes a decision. Therefore, the guidance significantly expands CEQ monitoring authority. Any such duty would be limited to the federal agency's jurisdiction under NEPA. In addition, any measurable performance standards to determine the effectiveness of mitigation appears to conflict with *Robertson* since the case determined that NEPA does not require such plans. NCBA and PLC urge the CEQ to maintain and not expand its authority under NEPA.

We thank you for your consideration of our comments.

Sincerely,

Steve Foglesong
President
NCBA

Skye Krebs
President
PLC